

ORIGINAL

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

OCT 23 2 50 PM '91

In re Application of)

SHIRLEY A. PENROD)
South Waverly, Pennsylvania)

Application for a New FM)
Station on Channel 241A)

To: The Commission)

AUDIO SERVICES

File No. BPH-910708ME

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Federal Communications Commission
Office of the Secretary

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FM EXAMINERS

5 PETITION TO DENY

William F. O'Shaughnessy (WFOS), who has filed an application^{1/} in competition with the above-captioned application, herewith, by his attorneys, requests that the Commission deny or specify an appropriate issue at the time of designation for hearing to determine whether the Penrod application is a sham which fraudulently fails to disclose the interest in her application of Robert J. Pfuntner of Elmira, New York, who owns WELM(AM) and WLVY(FM), Elmira; WABH(AM) and WVIN-FM, Bath, New York; WACK(AM), Newark, New York and--his most recent acquisition--WNNR(FM), Sodus, New York.^{2/}

I. The Penrod South Waverly Application

The Penrod application reveals (Exhibit II-1) that Mrs. Penrod is the wife of Robert L. Penrod, "currently general manager" of Mr. Pfuntner's Bath, New York, stations. Figure 5 of the Penrod application's engineering exhibit shows that Ms.

^{1/} Mr. O'Shaughnessy's application is BPH-910703MK.

^{2/} WNNR(FM) Ownership Report of September 24, 1990 (Official Notice Requested).

Penrod's proposed 1 mv/m contour will encompass Elmira, the community of license of Mr. Pfuntner's WELM and WLKY.

Thus, the wife of the General Manager of Mr. Pfuntner's Bath stations is applying--allegedly entirely on her own--for a new FM station that will directly compete with her husband's employer. Has this aroused Mr. Pfuntner's ire? Not at all. Not only has Mr. Penrod not been fired from the Bath stations by Mr. Pfuntner but he has no intention of leaving Mr. Pfuntner's employ even if his wife's application is granted. After noting that there is no 70 or 60 dbu contour overlap between the South Waverly FM proposal and the Bath FM station or city grade overlap between South Waverly and the Bath AM station, Exhibit II-1 says that, while her proposal will not compete with the Bath stations:

"Nevertheless, should Shirley A. Penrod succeed in obtaining the FCC construction permit for the South Waverly station, she states that her husband, Robert L. Penrod, stands prepared to resign his position with WABH/WVIN should the Commission determine any potential managerial conflict exists."
(emphasis added)

A lawyer would appear to have a severe conflict of interest if he represented an applicant for a new FM station that would be directly competitive with an existing client's AM/FM combination. But both Mrs. Penrod and Mr. Pfuntner share the same law firm and lawyer, Robert J. Olender, of Baraff, Koerner, Olender & Hochberg, P.C. in Washington.^{3/} Thus, at a bare minimum, Mr.

^{3/} See the Olender transmittal letter for the South Waverly application and the Olender transmittal letter for the 1991 Elmira license renewal applications (Official Notice Requested).

Pfuntner must have concluded that his interests are not now in conflict with those of Mrs. Penrod.

Were this the only evidence of a Pfuntner connection, the Commission might simply conclude that Mr. Pfuntner is an unusually warm and generous employer who is so kindly that he will keep employing in a senior management position the husband of a would-be-direct-competitor and even share his lawyer with her. But we think it is obvious that Mr. Pfuntner has his own, rather different, agenda.

II. The Nicastro Southport, New York Application

On May 16, 1990, Mr. Pfuntner's attorney, Mr. Olender, filed an application (BPH-900516MN) for a new FM station in Southport, New York for one Nancy Nicastro. Southport is a small town on the southern border of Elmira and the proposed facility will place a city-grade signal over the entire city. (Id., Engineering Statement, Figure 5). And who is Nancy Nicastro? According to Exhibit 1 of that application, she "...has been employed as Business Manager for Stations WELM and WLVY, Elmira, New York, since 1987." (Id.) a position she proposed to leave if her application were successful.

So warm-hearted Mr. Pfuntner has once again shared his lawyer with a person who will compete directly with his Elmira stations and will remain in his employ unless and until she succeeds. But Mr. Pfuntner's generosity truly knows no bounds. Thus, Question 3, Section VII of the Nicastro application reveals that Ms. Nicastro's proposed transmitter site is owned by the

beloved Robert Pfuntner and the engineering portion shows (Section V-B, Question 3) that it is the identical site used by Mr. Pfuntner's own Elmira FM station, WLVY. The Nicastro application was granted last month and is now being constructed.^{4/}

As for Mr. Olender, note that he not only had to determine that he had no conflict with Mr. Pfuntner in order to represent Ms. Penrod in South Waverly but also had to determine that there was no conflict between the interests of Ms. Nicastro and Ms. Penrod--both applicants for new Class A FM stations in essentially the same area.

III. The Sodus/Clyde, New York Applications

According to the 1991 edition of Broadcasting Yearbook, p. B-227, Robert Pfuntner has owned a stand-alone AM station (WACK) in Newark, New York, since 1972. In Docket 80-90, the Commission allocated a new Class A FM station to Sodus, New York, which is approximately 10 miles north of Newark.

On the filing deadline of November 10, 1987, only one applicant filed for the new Sodus FM facility, an engineer by the name of Craig Fox, who lives in Syracuse (40 miles east of Sodus). The proposed facility (BPH-871110MH) must overlap substantially the service area of Mr. Pfuntner's five kilowatt Newark AM facility since it places a 1.0 mv/m contour on the

^{4/} There had been six applicants for Southport. Three failed to file notices of appearance or filing fees, one dismissed without apparent compensation and the final rival was paid \$50,000 to settle the case. (See Judge Gonzalez' opinion in MM Docket No. 91-186, FCC 91M-2875, released September 20, 1991).

outer edge of Newark itself. (Id., Engineering Exhibit E-3). Since Mr. Pfuntner would not have been entitled to a daytimer's preference--because WACK is not only a fulltime station but also located in a separate community--and had an existing aural broadcast facility in the Sodus area, he would have been an extremely weak applicant and, apparently, elected not to file for the new FM facility.

Another reason for apparently not filing for Sodus was that the Commission had also dropped a Docket 80-90 Class A facility into Clyde, New York, which is only five miles from WACK, Newark.

On May 19, 1988, John and Anne Tickner, dba Wayne County Professional Broadcasters and represented by the ubiquitous Mr. Olender, filed an application for the new Clyde FM station. Although Mr. Tickner was Mr. Pfuntner's General Manager at stand-alone WACK(AM), which would be expected to suffer severe competitive injury from a new, next-door, FM facility, Mr. Tickner did not resign from WACK and was not fired from his senior position with the station.^{5/} Nor, obviously, did Mr. Olender find any conflict between his representation of WACK and Mr. and Mrs. Tickner's new proposal.

Unlike Mr. Fox's unopposed application in Sodus, a competing application was filed against the application for Clyde, New York, by Katharine Ingersoll et. al., dba KIC Radio, Inc. For reasons presently best known to Messrs. Pfuntner and Tickner, the

^{5/} See Exhibit No. 3 to BAPH-900416HD, an April, 1990, exhibit to the Sodus assignment application, reporting that Mr. Tickner was still WACK's General Manager.

Tickners agreed to dismiss their Clyde application on January 10, 1989, in return for \$21,000 and a Joint Request for Approval of the dismissal agreement was granted on April 6, 1989. (Official Notice requested). This still left Mr. Pfuntner and his manager Mr. Tickner with a stand-alone AM station in Newark--but not for long.

Mr. Fox's permit for his new Sodus FM facility (BPH-871110MH) was granted on June 17, 1989. On April 16, 1990, an application (BAPH-900416HD) was filed to assign Mr. Fox's Sodus construction permit to Waynco Radio, a general partnership in which Mr. Pfuntner owned 50% and Mr. Tickner owned 50%. (Id. Table 1) Although Mr. Fox allegedly had spent \$10,500 to secure his construction permit (Id., "Assignor's Itemization of Costs"), he apparently^{6/} agreed to sell his permit for only \$10,000.

Thus, following the compensated dismissal of the Clyde, New York application for which Mr. Tickner and his wife appear to have acted either with or on behalf of Mr. Pfuntner, Mr. Pfuntner and Mr. Tickner were apparently able to purchase the nearby Sodus permit for less than its (uncontested) prosecution costs.

IV. Pfuntner's Pattern of Conduct Is Obvious

Without relying on third-party affidavits (which petitioner is seeking and expects to obtain), the Commission's files by themselves reveal a pattern of conduct with respect to filing for

^{6/} The purchase price is not entirely clear since the copy of the assignment application reviewed for this pleading appears to have some missing pages, including the first page of the brief contract of sale signed by the parties on April 13, 1990.

Docket 80-90 allocations in which Mr. Pfuntner has an obvious interest which is so consistent that it cannot be ignored. His employees or agents, normally represented by his attorney Mr. Olender, file for facilities which are, at least in theory, directly competitive with his existing radio interests. The employees or agents file as individuals (or as husband and wife joint applicants) and represent that Mr. Pfuntner--who would poison the applications because of his nearby media interests--has no ownership interest of any kind in them. Not only are his employees secure in their employment but, at least in the Penrod case, they do not even contemplate leaving Mr. Pfuntner's employment if they are successful and become his direct competitor. Moreover, Mr. Olender, Mr. Pfuntner's attorney, obviously finds no conflict with Mr. Pfuntner's interests while representing the Tickners in the Clyde and not just one but two applicants for competing FM stations in the market (Elmira) in which Mr. Pfuntner already has his most substantial economic interests.^{7/}

V. Conclusion

In view of the foregoing, an issue must be added to determine whether Robert Pfuntner has an undisclosed interest in

^{7/} Elmira (1990 Census population 33,724) is a significantly larger market than either Newark/Sodus (1990 Census population 11,753) or Bath (1990 Census population 5,801). (Official Notice requested).

the Penrod application and, if so, whether this disqualifies her from being a Commission licensee.^{8/}

Respectfully submitted,

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^{8/} If Ms. Penrod is disqualified, it seems obvious that the same would, at least eventually, be true of Mr. Pfuntner, Ms. Nicastro and Mr. Tickner. For this reason, we are serving their joint counsel, Mr. Olender, with copies of this pleading for each of them and wish to be advised promptly if he is unwilling or unable to provide copies to them.

CERTIFICATE OF SERVICE

I, Judy Cooper, a secretary in the law firm of Koteen & Naftalin, certify that on the 22nd day of October, 1991, copies of the foregoing "Petition To Deny" were deposited in the U.S. mail, postage prepaid, addressed to:

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